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IN THE

Supreme Court of the ~~United~~ States

TERM—1942

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FRANHAM DISTRIBUTORS, INC.,
Petitioner,

against

NEW YORK WORLD'S FAIR 1939 INCORPORATED AND SWIFT & COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION

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Franham Distributors, Inc.

April 6, 1942.

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IN THE

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TERM—1942

FRANHAM DISTRIBUTORS, INC.,
Petitioner,

against

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Franham Distributors, Inc., respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court, entered on February 6, 1942, affirming a judgment of the District Court of the United States for the Southern District of New York, entered on October 31, 1940, in favor of the defendants New York World's Fair and Swift & Company. Application for a rehearing, timely filed, was denied by the Circuit Court on January 8, 1942.

THE ACTION BELOW

The action below was commenced in the Supreme Court, New York County and removed to the United States District Court for the Southern District of New York upon a complaint which contained a count against the defendant World's Fair for damages for breach of a contract which awarded the hamburger and frankfurter concession at the World's Fair to the plaintiff and against the defendant Swift and Company upon a separate count for inducing a breach of the same contract.

The answer interposed to the complaint by the World's Fair was substantially that no contract had been entered into between the plaintiff and the defendant World's Fair because a bid for the hamburger and frankfurter concession was required to be accepted in writing, signed by the president of the Fair corporation and that the bid of the plaintiff was rejected by the Executive Committee of the Fair on the ground that it appeared that the people connected with the plaintiff were not sufficiently qualified as restaurateurs to operate the concession.

The defendant Swift & Company relied on the contention, as appears by its answer, that there was no contract between the plaintiff and the defendant World's Fair and denied that it in any way interfered with the contract between the plaintiff and the World's Fair if any there was.

The trial of the action below proceeded before Judge Grover M. Moscowitz and a jury in the Southern District Court of New York on October 7th, 1940, and concluded with a dismissal of the complaint on the 10th day of October, 1940. The complaint was dismissed on the ground that the plaintiff had failed to establish a cause of action.

We shall refer hereinafter to the defendant, New York World's Fair 1939 Incorporated, as World's Fair. The references are to the folios in the record below. The Circuit Court of Appeals, as stated, affirmed the judgment of dismissal, with an opinion, hereinafter referred to.

STATEMENT OF FACTS INVOLVED

Preparations for the World's Fair were begun in 1937, and in July of that year, the Fair entered into a contract with Swift & Company for the building, construction and maintenance by Swift & Company of an exhibit at the Fair (179).

Towards December of 1937, the Fair solicited bids for the hamburger and frankfurter concessions (180).

About that time one Tom Trulis, who had been in the restaurant business for years and had operated hamburger and frankfurter concessions at the Navy Pier in Chicago, and other places, approached Max N. Natanson, a real estate operator, with the idea of forming a syndicate for the purpose of obtaining the hamburger and frankfurter concession for which the Fair was soliciting bids. In turn, Natanson approached Louis and Morris Golde, men of the highest business reputation and of very substantial means, as subsequently admitted by the Fair. The Goldes formed the plaintiff corporation for the purpose of securing the concession and operating it (181-186).

The Goldes proceeded to get the information that the Fair disseminated to all proposed bidders, and filed, in accordance with the procedure outlined by the Fair, a questionnaire, stating the experience of the principal officers and stockholders of the corporation in the operation of a

frankfurter and hamburger concession and also their financial ability to carry out the enterprise (186-188).

Tom Trulis, the then president of the plaintiff, later temporarily resigned because it was necessary for him to travel frequently in connection with his other enterprises (188). The questionnaire was sent to the Fair and was considered by Commander Howard A. Flanigan, the then Assistant to the President and Chairman of the Pre-Qualifications Committee, who afterwards became its Executive Vice-President in charge of all the affairs at the Fair, including its concessions and exhibits (189) and was also considered by Maurice Mermey, Director of Exhibits and Concessions, also a member of the Pre-Qualifications Committee (190).

Thereafter, on February 1, 1938, plaintiff filed a bid in writing together with a check for $5,000 as required by the regulations of the Fair. This was the highest and, as claimed by the appellant, the successful bid.

The next highest bidder was the White Tower Management Co.; the third highest bidder was Edward Levine, proprietor of the Brass Rail Restaurant in New York City; and the fourth highest bidder was the York Food Co., subsidiary of Swift & Company.

These bids, sealed, were filed February 1, 1938. The bids were opened at the office of the Fair, at the Empire State Building, at 12 o'clock on that day and read in the presence of James S. Hemingway, member of the firm of Lord, Day & Lord, attorneys for the Fair, and Commander Flanigan, its Executive Vice-President, together with Louis Golde and Max N. Natanson (198).

On the same afternoon, Hemingway telephoned Mr. Golde at his office, 522 Fifth Avenue, New York City, and not finding him in telephoned Mr. Natanson. Mr. Heming-

way told Natanson that the Franham Distributors, Inc. was the successful bidder and that the concession had been awarded to it and that the Goldes should go to the Legal Department of the Fair, the next day at three o'clock and bring their lawyer with them to go over the contract which the Fair was preparing for signature in the meantime. Natanson was told by Hemingway that they should be ready to close at three o'clock on February 2, 1938 (198, 200). In the meantime, Golde received notice of Hemingway's call, at his office, and immediately telephoned him. Hemingway gave Golde substantially the same information as he had conveyed to Natanson a few moments before, namely "be ready to close; the concession had been awarded to Franham, they were the highest bidder; they were the successful bidder, to please be there with their lawyer the next day at three o'clock in the Legal Department of the Fair, at the Empire State Building to sign the contract" (201).

The next day Louis Golde, the then president of the plaintiff, together with Natanson, and Julius Zieser, attorney for the Corporation, proceeded to the Legal Department of the Fair to sign the contract. Present were James S. Hemingway, member of the firm of Lord, Day & Lord, attorneys for the Fair, and Maurice Mermey, Director of its Exhibits and Concessions. They both congratulated Mr. Golde on having been the successful bidder and on having been awarded the concession and they told him that the contract had been prepared for signature (202, 203). This contract which had been prepared by Mr. Hemingway between 12 o'clock on February 1st, the previous day, and 3 o'clock that afternoon, was complete in every detail, setting forth all the terms, conditions and provisions for

the award of the concession to the plaintiff in accordance with the terms of its bid (Pltf. Ex. 5; 565, 639, 645). The contract was handed to Mr. Zieser, who questioned Hemingway as to whether the contract was in the same form as the sample contracts distributed by the Fair with the original documents. Hemingway told Zieser that it was the same. Zieser looked it over and announced to Mr. Golde that the contract was satisfactory and ready for signature (204-205).

At that point, Commander Flanigan entered the room and was introduced to Golde, Natanson and Zieser. Flanigan congratulated Golde upon his having been the successful bidder and wished him luck with the concession. Hemingway then told Flanigan that the contract was ready for signature. Flanigan then asked Golde whether he had made any commitments for the meat to be sold. Golde replied in the negative (206-207). Flanigan then said that Swift & Company had been very much disappointed in not having received the concession and it would be a great favor to the Fair as well as Swift & Company, which was one of the largest exhibitors at the Fair, if the Franham Distributors, Inc. would agree to purchase all its meats from Swift & Company so that their name would appear on the stands. Golde agreed to meet with a Swift & Company representative to discuss the matter and Flanigan, in the presence of Golde, told Mermey to ring up E. L. Morris, President of the York Food Co., subsidiary of Swift & Company, which had been an unsuccessful bidder for the concession (209-210) for the purpose of arranging an appointment between Morris and Golde that very afternoon at 4 o'clock. While Mermey was telephoning, Golde turned to Flanigan and asked him whether it would be

possible for the Fair in turn to do him a favor and reduce the amount of the bonds to be subscribed for as part of the agreement. Flanigan said that such a proposal would not be acceptable, and Golde thereupon acquiesced in this decision (211). Flanigan then said that if an arrangement with Swift & Company would be consummated, there might be a possibility of scaling down the percentages of gross income to be turned over to the Fair. Golde, however, indicated his satisfaction with the percentages agreed upon (212). Mermey then returned and told Flanigan an appointment had been made for E. L. Morris and Golde at 11 o'clock the next morning. Just before they left, Zieser turned to Flanigan and asked him when they should return to sign the contract and Flanigan said that the contract could be signed the next afternoon; that Golde and Morris should talk about arranging to buy the meats from Swift & Company and then Golde should ring Flanigan and fix the hour for signing the contract (215).

Immediately after the parties separated, Flanigan sent for Morris (President of the York Food Co., Swift & Co. subsidiary, the fourth highest bidder), they had a talk. Flanigan then saw Grover Whalen, President of the Fair (214), and an Executive Committee meeting was then called late that afternoon at the office of the Fair and a resolution passed rejecting all of the bids (216). Present at this meeting was Harvey Gibson, an intimate personal friend of Mr. Traynor, Treasurer of Swift & Company, one of the largest depositors of the Manufacturers Trust Company, whose president and chairman of the Board of Directors was none other than the same Harvey Gibson (217). No notice of the rejection of all of the bids was given to the plaintiff until later. The Executive Committee

thereafter proceeded to change the specification for bidding and to lower the price to be paid for the concession to the very exact minimum that York Food Company (Swift's subsidiary) had bid (216-217).

The next morning Morris met with Golde, who then had no knowledge of the attempted rejection of all of the bids, and he told Golde that he was not interested in making any arrangements for selling meat to the plaintiff but that Swift & Company wanted the concession for itself. Morris used the following language to Golde (220): "Now wait a minute, you haven't got that concession yet. I have been after that concession for eighteen months. We have got an exhibit at the Fair. If we don't get that concession, I have told the Fair people that we won't go on with our exhibit". Morris admitted having revealed his intentions to Flanigan and offered Golde some money to step out (221). Golde refused and they parted, Morris suggesting that he would telephone Chicago and submit the meat proposition to the home office of Swift & Company (222). Morris subsequently told Golde that he telephoned Chicago and that Chicago had also refused to consider the meat proposition. In fact, it appeared from the examination before trial of Morris that he never did telephone Chicago because he had received explicit instructions to obtain the concession and to have nothing to do with any other proposition (223).

A private wire was sent from Morris to Spang, Executive Vice-President of Swift & Company in Chicago to the following effect:

> "Get after Harvey Gibson to further develop the idea that when the concession is awarded again, there shall be very few bidders, and in addition to

let him understand that unless we get this concession, we shall modify our plans for the exhibit or possibly eliminate the exhibit entirely" (224).

Another wire, this time from Harvey Gibson to Traynor, Treasurer of Swift & Company in Chicago, intimated to Traynor that he, Harvey Gibson and Grover Whalen, now formed the committee, entrusted with the task of letting concessions, Commander Flanigan having been superseded. This telegram suggested to Traynor, Treasurer of Swift & Company, that the Swift & Company bid be put in through Gibson, one of the two members of the committee (225).

Swift & Company through its subsidiary, York Food Company, of course got the concession at the exact amount of its original unsuccessful bid (195-197). This bid, it is to be noted, was considerably lower than the Franham Distributors, Inc.'s bid (227).

Plaintiff immediately commenced to write letters to the Fair, demanding an explanation and this was followed by the institution of the present suit (228). Then while the contract between the Fair and Swift & Company through its subsidiary, York Food Company, was being drawn, a letter was sent by E. L. Morris to Hemingway to the following effect: "Delay consideration of the contract until we learn the basis of the Franham suit" (229).

The complaint was then served, charging the Fair with a breach of contract to let the hamburger and frankfurter concession to the plaintiff and also joining Swift & Company as a co-defendant in tort for inducing a breach of the contract between the plaintiff and the defendant World's Fair.

Immediately thereafter, a private telegram was sent from Spang, Executive Vice-President of Swift & Company in Chicago, to Morris, President of the York Food

Co., instructing him to refrain from giving out any publicity about the contract that they had made (231).

Thereafter, it was arranged that Childs & Co. should take the contract off their hands with the approval of Harvey Gibson and Grover Whalen, the Fair's Executive Committee. From the Childs & Co. files, the contract was procured, indicating that Swift & Company agreed to provide the meats and Childs was to operate and maintain the concession and take from Swift & Company over $200,000 of the bonds which Swift had subscribed for to the extent of $550,000.

The defense of the defendant World's Fair, as appears from the answer interposed to the complaint (fols. 29, 72) and the statement of its counsel in opening to the jury (240, 271), was that no contract had ever been entered into between the plaintiff and the defendant World's Fair because the bid was required to be accepted in writing, signed by the President of the Fair corporation (247) and that the bid of plaintiff was rejected by the Executive Committee on the ground that it appeared that the Franham people were not sufficiently qualified as restaurateurs to operate the concession (268).

Defendant Swift & Company relied on the contention that there was no contract between the plaintiff and the defendant World's Fair and denied that it, in any way, interfered with the contract between the plaintiff and the World's Fair, if there were any.

A previous trial had terminated in a mistrial because of a ruling of the trial judge requiring certain proof of damages not available at that time.

A motion for summary judgment was made by the defendant World's Fair in which it was contended,

1. That "the alleged oral agreement of said defendant to execute the 'concession agreement' was void by reason of the statutes of frauds of the State of New York, concerning real and personal property" (75).

2. "That irrespective of the statutes of frauds and oral acceptance of plaintiff's bid by the terms thereof would not bind said defendant to execute the concession agreement and that all bids for the concession involved herein were rejected by the Fair" (76).

Judge Bondy decided this motion in favor of the plaintiff. By order dated August 3, 1939 (115, 118), his opinion settled the question whether plaintiff's alleged oral agreement was violative of the various provisions of the statute of frauds in the negative. The Court construed the contract as an agreement to lease rather than a license to enter upon land which lease was for a term not exceeding one year and, therefore, need not have been in writing (686, 687). The Court also held that the contract could have been performed by both parties within one year from its making, and, therefore, did not violate Section 31, Subdivision 1 of the New York Personal Property Law.

As to the contention "that the alleged oral acceptance of the bid cannot bind the defendant", the Court said that if such oral acceptance was "deemed a defective acceptance it may be considered as a counter offer to which the plaintiff manifested its assent" (689). The Court then added

> "Moreover, a jury crediting the plaintiff's version of the discussion between the parties on February 2nd, 1938 might find that at that time, the parties agreed upon all the terms of the agreement and accordingly entered into a binding contract notwith-

standing their failure to execute a formal written instrument" (Citing cases) (689, 690).

At the trial, Louis Golde, President of the plaintiff, took the stand. Golde was questioned concerning a telephone conversation between himself and James S. Hemingway, member of the firm of Lord, Day & Lord, attorneys for the fair, which is claimed to have occurred during the afternoon of February 1st within a few hours after the bids had been opened at the offices of the Fair in the Empire State Building (333). The attorney for Swift & Company objected to any recital between Golde and Hemingway "on the ground that no representative of Swift & Company was present at the conversation and that, therefore, it cannot be binding" (335). This objection was sustained and the attorney for the defendant World's Fair interposed his objection "to any conversation with Mr. Hemingway on the ground that it has not been shown that Mr. Hemingway was an officer, agent or employee of the defendant corporation" (336). The court sustained the latter objection on the ground that the authority would "have to be shown first". The attorney for the Fair then conceded that Hemingway was a member of the law firm of Lord, Day & Lord, with offices in the Legal Department at the Fair and the attorneys for the Fair doing the legal work of the Fair, and that among his duties in the Concessions Department was to render sundry legal services for the Fair and to draft all the contracts in the Concessions Department (337, 338). The attorney for the defendant World's Fair again pressed his objection and it was sustained (339, 340).

Before attempting to interrogate Golde concerning conversations had with Maurice Mermey, the Director of Exhibits and Concessions at the Fair, which conversations

were alleged to have taken place at the Legal Department of the Fair on February 2nd, at 3 o'clock, the attorney for the defendant World's Fair was asked to concede and did concede "that Mr. Mermey was Director of Concessions at that time; that he was engaged as Director of Concessions in getting people interested in getting concessions" (344), and also that he was a member of the Pre-Qualifications Board (346). The court excluded such testimony in the following words:

"I won't permit any conversation with him" (346).

Plaintiff's counsel then read from the minutes of the last trial, beginning at page 60 thereof, where counsel for the defendant World's Fair conceded that Mr. Hemingway was a member of the firm of Lord, Day & Lord, counsel for the defendant World's Fair (350); that Hemingway had an office at the World's Fair on the 1st and 2nd days of February, 1938, where he acted in pursuance of certain duties as a member of the firm of Lord, Day & Lord, attorneys for the World's Fair corporation (351); and that Hemingway was spending a very large percentage of his time doing legal work for the World's Fair at the time in question (352).

With respect to Mr. Mermey the concession made at the previous trial was read that he was a member of the Pre-Qualifications Board, one of those who passed upon the pre-qualifications of the plaintiff, in accordance with his duties as a member of the board (353); that he was Acting Director of Exhibits and Concessions (354) from December 31, 1937 to September 9, 1939 (355); that it was among his duties to plan and develop the plan for the various type of concessions to be had and to sell all of the

domestic exhibit space which was for sale (356) and to negotiate various contracts for concessions and exhibits (357-360).

With respect to Commander Flanigan the concession at the previous trial was read to the effect that from the period December 1, 1937, and on through the year 1938, Commander Flanigan was Administrator and Assistant to the President and became Executive Vice-President of the World's Fair, but his duties remained the same (365). That his duties with respect to the hamburger and frankfurter concession were that he had both general supervisory charge of it, and also as the Chairman of the Concessions Pre-Qualifications Board he had a more intimate and executive direction of it (368).

Mr. Golde, president of the plaintiff, was then asked what was said at the conversation between himself, Mr. Mermey, Commander Flanigan and Mr. Hemingway. The attorneys for the defendant World's Fair pressed the objection and the same was sustained (369) on the ground that no proof had been shown that any of these men had the right to enter into a contract (370).

Plaintiff's counsel then asked the judge to take these conversations subject to later connection so that a record may be made upon which the court could determine whether the plaintiff had failed to make out its case because of insufficient proof of authority on the part of any of these men to act on behalf of the corporation (384), but the court adhered to its ruling, saying:

"I think it will have to be connected first" (386).

Counsel then further argued (402) that the Court of Appeals and the United States Supreme Court had held that

it was for the jury to determine whether these men had apparent or implied authority. The court responded:

> "I do not think there is enough to go to the jury on that, I mean as the record presently stands" (402).

The court then continued to adhere to its ruling, excluding all further testimony concerning these alleged conversations.

Plaintiff's counsel then offered to read that part of the affidavit of the defendant World's Fair by Howard A. Flanigan, its Executive Vice-President, verified the 18th day of January, 1939, filed in this action by the defendant World's Fair in support of its motion for Summary Judgment, as an admission against the defendant as to the authority of Flanigan to act on behalf of the defendant World's Fair, in which, among other things, it was stated that Flanigan was the administrative assistant to the President of the Fair and in that capacity was responsible for the taking and *consideration* of bids for the concessions involved in this action (80). Objection was taken and the court sustained the objection (404-409).

Counsel for the plaintiff then offered to prove, in addition to what had gone before, that Mr. Mermey had authority to sell all of the domestic exhibit space to be sold and to negotiate the various contracts for the concessions and exhibits (413). The court then noted that it considered this matter already proven (413).

Mr. Golde was then asked by his counsel whether plaintiff's exhibit 10 for identification, the written contract for the hamburger and frankfurter concession, prepared by Mr. Hemingway, but unsigned, was in the hands of Mr. Hemingway and on the table before him on February 2nd, in the presence of Mr. Hemingway, Mr. Mermey and Commander

Flanigan at the World's Fair. Objection was made and sustained (420).

Plaintiff's counsel then sought to read into the record part of the deposition of Grover A. Whalen, then president of the defendant World's Fair, as follows:

> "Q. When did you first learn of the fact that Mr. Hemingway had prepared plaintiff's exhibit 5 for identification (pl. ex. 5 at the examination before trial is the same as pl. ex. 10 at the trial, the unsigned concession contract prepared by Hemingway for signature). A. I don't know as I have any definite knowledge that this specific concession agreement was drawn except that it was in the line of Mr. Hemingway's responsibility to draw these immediately after bids were received *and accepted by the corporation.*"

This testimony was stricken from the record upon motion by counsel for the defendant World's Fair (426).

James S. Hemingway then took the stand and was asked whether he prepared the contract for the parties about the 2nd day of February, 1938 (430). This question was objected to and excluded (431). He was then asked whether he met with Natanson, Louis Golde and their attorney, Julius Zieser, on February 2, 1938, at the legal department of the World's Fair—yes or no. Objection was made and sustained (431). He was further asked whether the agreement was present on the table before him at the time in question (432). The question was objected to and excluded (433).

The next morning plaintiff being unable to give testimony concerning any of the conversations had with these three persons whom it is claimed accepted the plaintiff's bid on behalf of the World's Fair, was forced to rest. Counsel

for the two defendants then moved to dismiss the complaint on the ground that on the law and the facts plaintiff failed to make out a *prima facie* case which motions were granted (456-8).

In dismissing the complaint the court accepted as the law of the case Judge Bondy's decision that an oral contract would have been sufficient (458), and then, continued:

> "surely it is contemplated that a written binding agreement must be signed before either side shall be bound. No such agreement was signed. However, the plaintiff contends that it made an oral contract, but it has not established by any satisfactory proof any such contract. It has not been shown that the persons with whom the representatives of the plaintiff spoke had any authority to bind the World's Fair Corporation.
>
> *Really, from the opening of the plaintiff's counsel itself, it appears that plaintiff knew they had no contract because they knew that it had to be in writing.* Of course I appreciate the fact that an oral contract may be binding even though the authorities may say that 'we intend to put it in writing', and even without putting it in writing the contract may nevertheless be binding. However, in this case there is no evidence that the parties with whom the plaintiff's representatives had conversations could bind World's Fair Corporation. The motion to dismiss is granted."

JURISDICTION

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on February 6, 1942. The jurisdiction of this Court is involved under Section 347 (a) of the Judicial Code, as amended, Title 28 (June 7, 1934).

QUESTIONS PRESENTED

I

Did the Court below err in holding that the trial judge properly excluded evidence of conversations between the president of the plaintiff corporation and the executive vice-president, Director of Exhibits and Concessions and attorney for the defendant World's Fair?

II

Did the Court below err in holding that the trial judge properly excluded a portion of the deposition of Grover A. Whalen, president of the defendant World's Fair, describing the nature of the authority of the attorney for the World's Fair?

III

Did the Court below err in holding that the trial judge properly excluded an affidavit of the vice-president of the defendant World's Fair, in which was set forth the nature and scope of his duties as such executive vice-president?

IV

Did the Court below err in failing to modify its order directing the dismissal of its cause of action herein against the defendant-appellee Swift & Company for inducing breach of an existing contract without prejudice and not upon the merits, so as to permit the bringing of an action against Swift & Company for malicious prevention of plaintiff's execution of a contract with the defendant-appellee New York World's Fair?

REASONS FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Court below holding that the trial judge, in excluding testimony of conversations between representatives of plaintiff corporation and a Director of Exhibits and Concessions, the executive vice-president and the member of the firm of attorneys for the defendant World's Fair, improperly decided as a matter of law a question which should have been reserved for the consideration of the jury as a question of fact. This is contrary to the decisions of the Courts of this State.

Hooker v. *Eagle Bank,* 30 N. Y. 83, 85-86;
Lyon v. *West Side Transfer Co.,* 132 App. Div. 777, 779;
Young v. *U. S. Mortgage & Trust Co.,* 214 N. Y. 279, 285;
Tyler v. *Anglo-American Sav. Assoc.,* 30 App. Div. 404, 406-8, 409;
Norton v. *Genessee Nat. Sav. Assoc.,* 57 App. Div. 520, 522-3;
Bathbun v. *Snow,* 123 N. Y. 343, 349;
Farmers Fund, Inc. v. *Tooker,* 207 App. Div. 37;
Leonardi v. *Times Square Automobile Co.,* 127 App. Div. 192, 193;
American Surety Co. v. *Philippine Nat. Bank,* 245 N. Y. 116, 126.

A. In excluding testimony of conversations between representatives of plaintiff corporation and representatives of defendant World's Fair concerning the making of the alleged oral concession agreement.

This exclusion is contrary to both Federal and New York Law.

Stecher Lithographic Co. v. *Inman,* 175 N. Y. 124, 127;
Sollows v. *McCann Erickson Inc.,* 27 Fed. Sup. 491.

B. In erroneously deciding the question of agency which should properly have been reserved for the consideration of the jury as a question of fact.

This is in complete contradiction of the decisions in New York State.

Bussing v. *Lowell Film,* 233 App. Div. 493;
Mott v. *Consumers' Ice Co.,* 73 N. Y. 543, 550;
Lyon v. *The West Side Transfer Co.,* 132 App. Div. 777, 779;
Gaillard Realty Co., Inc. v. *Manhattan Bross Co., et al.,* 238 App. Div. 84, 86;
Courtney v. *Baker,* 60 N. Y. 1, 5;
Conant v. *American Rubber Tire Co.,* 48 App. Div. 327, 330.

C. In failing to allow the admission of proof of the alleged oral agreement first and consideration of the question of authority at later stage of the trial.

This is contrary to the decisions of the Supreme Court of the United States.

First Unitarian Soc. of Chic. v. *Faulkner,* 91 U. S. 415;
Bank of the Metropolis v. *Guttschlick,* 14 Pet. 19, 39 U. S. 335, 340.

D. In failing to heed Judge Bondy's decision denying defendant World's Fair's motion for a summary judgment, which was the law of the case.

This is contrary to established practice sanctioned by the Supreme Court of the United States.

Davis v. *Davis*, 96 Fed. (2d) 512, 515 aff'd 305 U. S. 32;
Messenger v. *Anderson*, 225 U. S. 436, 444;
King v. *West Virginia*, 216 U. S. 92, 100.

E. In allowing the defendant by mere denial to evade the burden of showing lack of authority which was on the defendant World's Fair.

This is contrary to the decisions of the highest New York Courts.

Lyon v. *Westside Transfer Co.*, 132 App. Div. 777;
Patterson v. *Robinson*, 116 N. Y. 193.

2. The decision of the court below, holding that the trial judge in dismissing the complaint as against the defendant Swift & Co. on the merits was proper.

This is contrary to well-established law.

Lewis v. *Bloede*, 202 Fed. 7;
Union Car Advtg. Co. v. *Collier*, 263 N. Y. 386, 401.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and

send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that the petitioner be granted such other and further relief as may seem proper.

Dated, New York, N. Y., April 4th, 1942.

Signed: ALEXANDER PFEIFFER
Attorney for Franham Distributors, Inc.